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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CHANG SIK YANG, Plaintiff and Appellant, v. NAM JIN OH, Defendant and Respondent.	B208735 (Los Angeles County Super. Ct. No. BC371016)

APPEAL from a judgment of the Superior Court of Los Angeles County, Aurelio Munoz, Judge. Affirmed.

Stroud & Do, James T. Stroud and Van T. Do for Plaintiff and Appellant.

Jones & Ayotte and Normand A. Ayotte for Defendant and Respondent.

INTRODUCTION

Plaintiff Chang Sik Yang, doing business as One Stop Fashion, appeals from a judgment in favor of defendant Nam Jin Oh, doing business as Bestway Liquor, entered pursuant to defendant's motion under Code of Civil Procedure section 631.8. We affirm.

FACTS[1]

Plaintiff's business, One Stop Fashion (One Stop), and defendant's business, Bestway Liquor (Bestway), were located next to one another in a building on property owned by defendant on Figueroa at 41st Street. There was a parking lot at the rear of the property.

Defendant allowed two people to live in the parking lot: an elderly man named Al, known as OG Pops, and a woman named Caroline. The two lived in makeshift tents located against the wall of the building. They obtained electricity by a cord plugged into an electrical outlet in a light fixture by One Stop's back door. Defendant was aware of this situation.

Jeffrey Williams (Williams) worked for both plaintiff and defendant, providing security, as well as working in their businesses. There were many gang members in the neighborhood, and Williams was there to prevent them from stealing from the businesses or intimidating the customers. He slept in a van owned by plaintiff and located at the back of the businesses' parking lot.

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1 As discussed more fully below, on appeal from a judgment entered pursuant to Code of Civil Procedure section 631.8, the facts are those adduced from the evidence presented by plaintiff. (*People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes* (2006) 139 Cal.App.4th 1006, 1012.)

Detective Dorian Henry of the Los Angeles Police Department investigated a robbery at One Stop in December 2006. As a result of his investigation, arrests were made on December 14.

There had been two fires on the premises that Williams was aware of. Once, there was a fire in Al's tent when candles he was burning set fire to his clothes. Williams put out that fire. Williams told defendant about the fire, and defendant told him to be careful and keep an eye on Al.

The second time, a palm tree at the back of the parking lot caught fire. Al was living by the palm tree at the time. He moved over by the building later, when a recycling center was set up at the back of the parking lot.

On January 1, 2007, Williams got up in the morning and went to breakfast. On his way back, he saw smoke. He went to the parking lot, where he saw the building on fire and Al trying to put out the fire. He saw a truck on fire and forced Al from the lot, worried that the truck would explode. The fire went up the wall of the building, caught the roof on fire and from there spread to the inside of the building, where plaintiff had merchandise stored.

Bestway had a video camera on the corner of the building. Williams saw a videotape of the fire about a week later. It showed that the fire started in Al's tent.

Plaintiff did talk to defendant about people living in the parking lot. Customers were not willing to come to his business if they had no place to park their cars. Defendant told him to wait until March, when the contract for the recycling center expired. Once the recycling center was gone, the people would leave.

DISCUSSION

Plaintiff contends the trial court erred in granting judgment to defendant, in that his evidence established a prima facie case of negligence on defendant's part. For the reasons set forth below, we disagree.

Code of Civil Procedure section 631.8 was enacted "'to enable the court, when it finds at the completion of plaintiff's case that the evidence does not justify requiring the defense to produce evidence, to weigh evidence and make findings of fact.' [Citation.] Under the statute, a court acting as trier of fact may enter judgment in favor of the defendant if the court concludes that the plaintiff failed to sustain its burden of proof. [Citation.] In making the ruling, the trial court assesses witness credibility and resolves conflicts in the evidence. [Citations.]" (*People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes, supra*, 139 Cal.App.4th at p. 1012.)

Our review of the judgment is governed by the substantial evidence rule. "[W]e view the evidence in the light most favorable to the judgment, and are bound by the trial courts' findings that are supported by substantial evidence. [Citation.] But, we are not bound by a trial court's interpretation of the law and independently review the application of the law to undisputed facts. [Citation.]" (*People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes, supra*, 139 Cal.App.4th at p. 1012.)

It is plaintiff's argument that the facts here are undisputed, and the trial court erred in its application of the law of negligence to these undisputed facts. However, the "facts" he cites in his opening brief include the allegations of his complaint and an incident report attached as an exhibit to the complaint. Plaintiff's unverified complaint and attached exhibit are not evidence. (Evid. Code, § 140; see *Cal. Employment Com. v. Malm* (1943) 59 Cal.App.2d 322, 324-325; see also *Sheard v. Superior Court* (1974) 40 Cal.App.3d 207, 212 and fn. 1.) Thus, we do not consider them in assessing whether substantial evidence supports the judgment.[2]

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[2] Plaintiff argues that since defendant did not object to the incident report and it is part of the record on appeal, we must consider it. Plaintiff cites no authority for this proposition. Since plaintiff did not move to admit the report into evidence, defendant had no call to object to it. (Cf. Evid. Code, § 353 [motion to exclude or objection to admission a prerequisite to reversal for erroneous admission of evidence].) That failure does not make the report evidence. Neither does the fact that it is part of the record on appeal elevate it to the status of evidence which we must consider. (See Cal. Rules of Court, rules 8.120, 8.122(b) [contents of record on appeal].)

The basis of defendant's motion for judgment was plaintiff's failure to present evidence of causation. Defense counsel argued that there was "no evidence offered in any way, shape, or form as to what the source of ignition was. [¶] The court would have to speculate and bridge the evidentiary gap between this electrical cord from the light to an ignition source, and we don't know that was the cause."

In response, plaintiff's counsel pointed out that there had been two prior fires, and that Williams "saw the fire start in the tent next to the building. So whether it was caused by electrical or candle, there is a duty [to take care of the premises to prevent a foreseeable risk of harm]." Counsel argued that the question of causation is 'basically a question of common sense and practicality[.] It's more likely than not, that's all I've got to prove, more likely than not based on the testimony of Mr. Williams that the fire[] originated in the tent" and then spread to the building.

In order to recover damages for negligence, plaintiff must show that defendant owed him a duty of care, breached that duty, and the breach was a substantial factor causing injury to plaintiff. (*Dixon v. City of Livermore* (2005) 127 Cal.App.4th 32, 42.) Plaintiff must prove a causal connection between defendant's negligence and his injury. The "[p]roof of causation must be by substantial evidence, 'and evidence "which leaves the determination of these essential facts in the realm of mere speculation and conjecture is insufficient." [Citations.]' [Citation.]" (*Id*. at p. 43.)

Plaintiff argues that had defendant not permitted Al to set up makeshift tents in the parking lot and improperly rig an electrical wire to his heater, there would have been no fire. He asserts that "[a] reasonable person in [defendant's] position would have thought it reasonably possible that a fire would be a natural consequence of that improper rigging . . . ."

However, plaintiff presented no *evidence* that the fire was caused by improper electrical rigging to a heater. The only evidence as to the origin of the fire was Williams' testimony that a videotape showed that the fire started in Al's tent. It is """mere speculation and conjecture""" (*Dixon v. City of Livermore*, *supra*, 127 Cal.App.4th at p. 43) that the fire was caused by improper electrical rigging.

There was evidence of a fire previously in Al's tent when candles he was burning set fire to his clothes. There was no evidence that the fire at issue was caused by the use of candles. Moreover, without evidence as to the cause of the fire at issue, it is impossible to find that the previous fire should have put defendant on notice of the possibility of a fire such as the one at issue, giving rise to a duty of care to prevent such a fire.

In the absence of evidence of causation, plaintiff failed to prove negligence. (*Dixon v. City of Livermore*, *supra*, 127 Cal.App.4th at p. 43.) Substantial evidence thus supports the judgment. (See *People v. Manson* (1977) 71 Cal.App.3d 1, 46; cf. *Greening v. General Air-Conditioning Corp.* (1965) 233 Cal.App.2d 545, 550.)

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.